No. 11859

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

vs.

HOBART E. KEITH and LOUISE E. KEITH his wife,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS,
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BRIEF OF APPELLANT

JURISDICTION

This cause was commenced by the plaintiffs, Hobart E. Keith and Louise E. Keith, his wife, by filing a complaint in the District Court of theUnited States, Western District of Washington, Southern Division, on February 21, 1947 (Tr. 10). The complaint sought

recovery, under the Federal Tort Claims Act, of damages suffered by plaintiff Hobart E. Keith in a collision on July 9, 1946, between plaintiff's automobile and a government owned vehicle, the total of said damages alleged to be in the sum of $41,260.10. (Tr. 2-10).

After a trial before the court, a judgment was entered in favor of the plaintiffs and against the defendant United States of America in the sum of $16,100.00 and costs (Tr. 24-25). This judgment was entered October 6, 1947. A notice of appeal was filed by the defendant United States of America on January 2, 1948. (Tr. 26) This court has jurisdiction pursuant to 28 U.S.C. 225 and Rule 73 of the Rules of Civil Procedure.

QUESTION PRESENTED

Upon trial of claim arising under the Federal Tort Claims Act, where the court has rendered its decision finding the several items of damages suffered by plaintiff in the total sum of $14,000 and allowing in addition 15% therof for attorney fees in the sum of $2100.00, with a total recovery of $16,100, and thereafter and on presentation sign, over objection by defendant, formal findings distributing the amount allowed for attorney fees to an item of the damages, may the court properly thereupon enter judgment for the sum of $16,100 in order that the statutory require-

ment that such fees be deducted and not added may be complied with and at the same time so that such allowance has not the effect of reducing the amount of damages the court has found the plaintiff suffered and should be allowed.

STATEMENT OF CASE

The District Court, at the conclusion of trial, on September 19, 1947, in rendering its decision and award of damages, announced its judgment as follows:

> "I am going to allow in this case for loss of earnings over the period of time that the evidence indicates that this plaintiff has been and will be unable to work, the sum of five thousand dollars; for his medical care and attention, seven hundred and fifty dollars; for loss and damage to the automobile and his personal property, seven hundred and fifty dollars; and general damages for permanent disability, pain, and suffering and future loss of earnings, the sum of seven thousand five hundred dollars; making a total of fourteen thousand dollars. Now, in addition thereto, I shall allow as the law provides, an attorney's fee in the sum of fifteen per cent, which would be two thousand one hundred dollars, making a total award and judgment of sixteen thousand one hundred dollars." (Tr. 43)

Thereupon the following objection was made by counsel for the defendant:

> "Mr. Sager: If your Honor please, the law does not authorize the allowance of attorney's fees in addition to the judgment."

"The Court: That's the way I read the statute, but we'll read it again. I read it first probably a little hurriedly."

The court then read Section 422 of the Act and further stated:

"That language makes your position sound Mr. Sager, but I will accomplish the same purpose by making an allowance of sixteen thousand dollars and provide for a fifteen per cent attorney's fee, as I intend to allow the plaintiff approximately fourteen thousand dollars net as his loss. I feel that there should be a net award of this fourteen thousand." (Tr. 44)

And it also later appeared:

"The Court: Your attorney's fees award would be slightly more in this manner than they would be as calculated on the fourteen thousand dollars." (Tr. 45)

Thereafter on October 6, 1947, at the time of presentation of formal Findings of Fact, Conclusions of Law and Judgment, as prepared by counsel for plaintiff, counsel for defendant took exception thereto as follows: (Tr. 50-53)

"Mr. Sager * * * *

I wish to take exception, however, to the finding number 5, in the computation of the amount of the total judgment. It allows a figure of $9,600.00 for general damages and suffering, and disfigurement and so forth. Now in that item there has been included the award of attorneys' fees, because when your Honor first announced its computation in the judgment that you allowed

$7500.00 for these elements of damage, and of course for the same reasons I think the judgment is in error in allowing a total of sixteen thousand one hundred, which in effect includes an addition of attorneys' fees, over and above the amount the court first found as having been the amount of damages. I think the statute is clear that attorneys' fees while fixed by the court, are not to be in addition to the judgment. They are to come out of the judgment, and I think that it is error to incorporate them in as part of the total judgment, and the obvious effect is to allow them as attorneys' fees. I think the judgment should be reduced by that amount. The original amount the court found as having been in measuring the damage of the defendant, — or of the plaintiff.

The Court: "Mr. Sager, it became entirely a matter of calculation, and the court stated expressly at the time I had misread the statute with reference to the attorneys' fees. I was under the impression that the attorneys' fees were in addition to the award to be made to the injured party. Upon that being called to the attention of the court, and a rereading of the statute, I was satisfied that such was the situation, but still of the opinion that the injured party was entitled to an award of approximately fourteen thousand dollars, net, and not fourteen thousand dollars from which there should be deducted attorneys' fees.

* * * *

Now there was no intention that the attorneys' fees should be added as such to the last item, but it all comes out the same if it were broken down, and the sum were added to these various items. In other words, the statute is not to be so rigidly construed as to make it impossible for the court to take into consideration what the award and attorneys' fee is going to be when making the

award for the loss sustained, and that would be the effect of the position you take, because the court might have made an error in calculation or in interpretation, it would become a situation, if your position was sound, where the court could never correct such an error and was forever bound by it.

Now technically it may be that this award should be scattered through the various items, but the result would be the same.

Mr. Sager: Well, of course my — the reason I raise the point at this time is that I think the effect of this judgment is to do what the statute says cannot be done, to allow an attorneys' fee over and above the actual amount of damage that the court found the man had suffered.

The Court: The statute certainly doesn't say that the court cannot exercise its discretion and allow an award, and out of that award there be attorney's fees, and in calculating it that the court could not take into consideration what he proposed to leave as the net amount for the injured party.

Mr. Sager: Of course, the court in the first instance, under the statute, is to find the amount of damage the person suffered, the amount of loss that he sustained. Now that is not — that is not affected one way or the other by attorney's fees. He either suffers $14,000 damages, or he suffers $16,000 damages. That is the actual loss that he has sustained.

The Court: I think, Mr. Sager, I stated — and of course it is a matter of common knowledge, that when we come to measure in dollars and cents human sufferings and injuries, there can be no standard by which we measure it with exactitude, and there is plenty in this record to

warrant a finding of $16,000 in damages in the aggregate, and that is the position the court has taken.

Mr. Sager: Well —

The Court: The fact that I under a misapprehension, used the figure $14,000, and of the opinion that added to that would be attorneys' fees, but always with knowledge that the attorneys' fees were a part of the item of allowance, and then corrected it and made it $16,000, it is it seems to me rather extreme technical grounds that the objection is made.

Mr. Sager: The court's misapprehension was not as to the amount of damages suffered by the defendant — or by the plaintiff. The court's misapprehension was to the effect of the statute in allowance of fees."

The trial court, although signing the formal findings, conclusions of law, and judgment, as presented by counsel for plaintiff, nevertheless was constrained to observe:

"The court: Well, the only correction that I would make in the judgment might even then be quite technical, that is — in the findings, the way the sum is broken down. It might be that might be modified, because all of these were very flexible items * * * *." (Tr. 54)

Thereupon, the court entered judgment for said sum, with exceptions to defendant. (Tr. 24 - 25)

The trial court had prior thereto by entry of its Pre-trial Order (Tr. 15-18) confined the issues of fact before the court to a single issue, namely,

"The amount of damage the plaintiff, Hobart E. Keith received." (Tr. 16)

STATEMENT OF POINTS TO BE URGED

1. That the District Court, in rendering judgment for plaintiffs, erred in allowing attorneys' fees in addition to an award of damages and in entering judgment in the aggregate amount including the allowance for attorneys' fees. (Tr. 43-45, 50-54).

2. That the judgment of the District Court is excessive in the sum of $2100.00, the amount of the attorneys' fees allowed in addition to the amount of damages awarded to the plaintiffs. (Tr. 24-25, 43).

ARGUMENT

The several specifications of error, Points I and II, embody practically the same subject matter and the appellant's argument as to one will apply with equal force as to the other. Therefore, they will be discussed together.

That part of Section 422 of the Federal Tort Claims Act of August 2, 1946 (28 U.S.C. 944), pertinent in the present instance, reads as follows:

> "The court rendering a judgment for the plaintiff pursuant to subchapter II of this chapter, * * * may, as a part of the judgment, * * * determine and allow reasonable attorneys' fees,

> which, if the recovery is $500 or more shall not exceed * * * 20 per centum of the amount recovered under subchapter II of this chapter, to be paid out of but not in addition to the amount of judgment * * * recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be subject to a fine of not more than $2,000 or imprisonment for not more than one year, or both."

The question seems to resolve itself into whether or not the court can do indirectly what it is forbidden to do directly. That is, whether or not the intent of the statute expressed in emphatic terms and with penalty for violation attached can be circumvented by the simple expedient of raising the damages in order to allow damages to a plaintiff in the full amount suffered, keeping in mind that a percentage must be deducted for attorney fees.

When after awarding plaintiff damages totalling fourteen thousand dollars, and in addition an attorney's fee of $2100.00, the attention of the court was directed to the statute, nevertheless the court was of the opinion:

> "I feel that there should be a *net* award of this fourteen thousand." (Tr. 44) (Italics supplied).

And at the time of entering the judgment, the

court restated its previously expressed position, as:

> " * * * Still of the opinion that the injured party was entitled to an award of approximately fourteen thousand dollars net, and not fourteen thousand dollars from which there should be deducted attorneys' fees." (Tr. 51)

And the court thereafter reiterated its construction of the statute:

> "In other words the statute is not to be so rigidly construed as to make it impossible for the court to take into consideration what the award and attorneys' fee is going to be when making the award for the loss sustained * * *". (Tr. 52)
>
> * * * *
>
> "The statute certainly doesn't say that the court cannot exercise its discretion and allow an award, and out of that award there be attorneys' fees, and in calculating it that the court could not take into consideration what he proposed to leave as the net amount for the injured party." (Tr. 52)

Such consideration seems tantamount to making the attorneys' fees an element of damages, and the general rule is:

> "Generally, there can be no recovery as damages of the expenses of litigation and attorneys' fees unless authorized by statute or contract." 25 C.J.S. Damages, Section 50.

In *Viner v. Untrecht*, 158 P. (2d) 3, at page 9, the Supreme Court of California recognized the foregoing rule:

"Generally, fees paid to attorneys are not recoverable from the opposing party either as costs, damages, or otherwise in the absence of express statutory or contractual authority. * * *"

"We find no room for interpretation in the matter. Moreover, it is improper to include attorneys' fees as a part of exemplary damages."

This rule has been observed in federal cases:

"It is well settled that a plaintiff cannot recover attorneys' fees incurred in connection with a suit to recover damages for a tort."

Insuranshares Corporation v. Northern Fiscal Corporation, 42 F. Supp. 126, 129.

In *Union Indemnity Co. v. Vetter*, 40 F. (2d) 606, where in an action on bond to recover for breach of building contract, the District Court permitted evidence of attorneys' fees to be introduced and the jury awarded damages on that account, the appellate court held the elements of damage consisting of attorneys' fees should be eliminated and that the appellee was entitled to what he actually and reasonably expended in finishing the building after the contractor had abandoned it, and thereupon reversed the cause and remanded the same for further proceedings in conformity with its ruling.

United States Fidelity & Guaranty Co. v. Highway Engineering & Construction Co., 51 F. (2d) 894, cites, and supports the Vetter case, supra.

See also *Frick Co. v. Rubel Corporation*, 62 F. (2d) 769;*Storley v. Armour & Co.*, 107 F. (2d) 499.

A similar statute, Section 8, Title 49, U.S.C., makes provision for damages and attorneys' fees as follows:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorneys' fee shall be taxed and collected as part of the costs in the case."

However, the court in *Sonken-Galamba Corporation v. Atchison, T. & S. F. Ry. Co.*, 28 F. Supp. 456, against the plaintiff's contention that it should recover the amount of attorneys' fees expended in a preliminary action in which defendant railway company was a party, in rejecting the same and refusing to broaden the elements of damage even where the wording of the statute indicated full relief, had this to say:

> "The express provision for the recovery of an attorney's fee in the suit for damages was necessary if such an attorney's fee is to be recovered, for the general rule is that an attorney's fee is not recoverable. The mere fact that Congress

> deemed it necessary to make special provision for the recovery of an attorney's fee in the suit for damages authorized by Congress strongly suggests that it was not intended by Congress that other attorneys' fees expended in merely incidental litigation should be recovered as damages. The statute provides that the injured party may recover 'the full amount of damages sustained'. But the phrase 'full amount' adds nothing to the significance of the statute, only 'damages known to the law' are recoverable. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 204, 33 S. Ct. 893, 57 L. Ed. 1446 Ann. Cas. 1915A, 315."

It is, therefore, the contention of appellant that the trial court's action herein in the allowance of attorney's fees is in effect an attempt to make the same an element of damages, and is due to mistake or error of law, and that such allowance should be corrected to conform to statute.

> See 5 C. J. S. Appeal and Error, Section 1636; *Mercantile-Commerce Bank & Trust Co. v. S. E. Arkansas Levee District*, 106 F. (2d) 966.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court is excessive in the sum of $2100.00, and should be reduced accordingly.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney.